MUI FINANCE BHD.

v.

LOW SEE THAM SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-31-3726-88]
11 JUNE 1991

LAND LAW: *Charge - Order for sale - Variation of interest rate - Capitalization of penalty interest - Without prejudice negotiations - Whether restructuring of loan - No evidence of fraud.*

CIVIL PROCEDURE: *Non-appearance of defendant's solicitors at date of hearing - No affidavit on merits - Serious mistakes.*

The defendant chargor defaulted in its payments to the plaintiff chargee as a result of which the chargee obtained default judgment and an order for sale against the defendant. The defendant then applied to set aside the order for sale, its solicitor arguing that through the inadvertence of the firm's clerk, the date for the hearing of the originating summons had been wrongly entered in the firm's Court diary.

Held:

[1] The non-appearance of the chargor's solicitors was inexcusable as the chargee had reminded the solicitors by way of notice of appointment for adjourned hearing of the new hearing date. The defendant's solicitors had therefore committed a serious mistake by ignoring the notice.

[2] The second and most serious mistake committed by the solicitors for the defendant is that in the affidavit in support of the defendant's application to set aside the plaintiff's judgment, there is no averment concerning the facts which would show a defence on merits. Such omission is incompatible with the inflexible rule in *Bank Bumiputra's* case as to the necessity of there being in existence an affidavit of merits.

[3] Pursuant to clause 1 and 3 of the annexure, the plaintiffs had a right to vary the interest and impose capitalisation of penalty interest.

[4] There was evidence that the plaintiffs had informed the defendants by notice in writing from time to time of any increases or decreases in the ruling interest rate.

[5] Although the plaintiff had agreed to extend the loan period, they had clearly stated that all other terms and conditions shall remain unchanged, meaning that all other terms and conditions in the annexure would continue to apply.

[6] The indulgence granted by the plaintiffs in not proceeding against the defendants was on a without prejudice basis and this was not denied by the defendants. This did not amount to a restructuring of the loan nor was it an acquiescence by default.

[7] The defendant had failed to give particulars of even a single item of misappropriation of their money by the plaintiff.

[Defendant's application dismissed with costs.]

Cases referred to:
Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Rakyat [1979] 1 MLJ 23 ***(foll)***
Ratnam v. Cumarasamy [1964] 3 All ER 933 ***(foll)***
Wallingford v. Mutual Society [1880] 5 AC 685 ***(foll)***

For the chargee/plaintiff - L.S. Ng; M/s. Sothi & Ang
For the chargor/defendant - Sri Ram; M/s. Philip Choong & Co.

JUDGMENT

Lim Beng Choon J:

This was an application made by way of a summons-in-chambers by the defendant on 11 January 1990 to set aside the judgment in default granted by this Court to the plaintiff on 8 January 1990.

The facts that are not in dispute, indeed cannot be disputed, are as follows.

The plaintiff filed this originating summons on 1 December 1988 for an order of sale by public auction of two parcels of land held under Pajakan Negeri No. 8 and 9, Lot No. 16455 and 16456, Mukim Batu (hereinafter referred to as "the lands"), which had been charged by the defendant to the plaintiff under a charge presentation registered as No. 30431/84 Jilid: 362 Folio 141 on 20 October 1984 to recover the amount due and owing to the chargee/plaintiff under the said charge. There were the usual prayers requesting for the Court to specify the date of holding the auction and for an application to be made to the Senior Assistant Registrar of the Court for directions regarding fixing of reserve price etc. and the disbursement of the proceeds of the sale of the lands. After service of the originating summons with the supporting affidavit on the defendant on 9 December 1988 the defendant had failed to enter an appearance and on 8 April 1989 the plaintiff was granted a certificate of non-appearance (encl. 4). On the same day the plaintiff took out a notice of appointment to hear the originating summons and the date of hearing was fixed for 14 September 1989. The said notice was served on the defendant on 9 September 1989 and only on 13 September 1989 did the solicitors of the defendant enter an appearance (encl. 6B). At the hearing of the originating summons on 14 September 1989 Counsel for the defendant asked for a postponement as she claimed that her firm was retained by the defendant to represent them only the day before. As Counsel for the plaintiff had no objection I granted a short postponement and fixed 26 October 1989 as the new date for hearing of the summons. On that date it was the turn of Counsel for the plaintiff to ask for a postponement on the ground that the defendant through their manager had affirmed an affidavit on 25 October 1989 (encl. 7) to oppose the plaintiff's application and the affidavit was served on the plaintiff's Counsel only on that very day and Counsel had to get instructions from his client to put up an affidavit in reply. Counsel for the defendant had no objection to the application for postponement. I therefore fixed the date of 8 January 1990 as the new date of hearing of the originating summons. On that date Counsel for the plaintiff appeared but Counsel for the defendant failed to appear. I therefore granted the plaintiff order in terms of their application.

The application of the defendant to set aside the judgment in default granted by this Court on 8 January 1990 was supported by an affidavit affirmed by one S. Thilagavathy on 11 January 1990 (encl. 16). It is to be noted that it was this Thilagavathy who appeared as Counsel for the defendant at the hearing of the originating summons on 26 October 1989 when I postponed the hearing of the originating summons to 8 January 1990 and she had noted it down in her file. However in her affidavit Cik Thilagavathy claimed that though the hearing date was recorded on the file it was passed to the recording clerk of her firm to

record the hearing date on her firm's Court diary and her personal diary which the said clerk owing to an inadvertent oversight had failed to do so albeit that the said recording clerk had stamped the file with the words "Hearing Diary Entered". However that may be Cik Thilagavathy did produce and annex as exhibits a page which she asserted was from her firm's diary dated 8 January 1990 and another page which she again asserted was a page of Counsel's diary dated the same date both of which do not show any entry as to the date of hearing of the originating summons. It was for that reason that Counsel for the defendant failed to appear at the hearing on 8 January 1990. She therefore asked me to re-hear the originating summons. Her affidavit was supported by an affidavit affirmed by the recording clerk (encl. 15) who admitted that due to an oversight on her part she did not enter the date of hearing of the originating summons on 8 January 1990 in her firm's diary or the diary of the Counsel.

Assuming that the omission committed by the recording clerk in not recording the date of hearing in the relevant diary of the firm and that of the Counsel is excusable nevertheless the solicitors for the plaintiff had reminded the solicitors for the defendant of the hearing date of the originating summons by serving a notice of appointment for adjourned hearing of the originating summons on the said solicitors on 3 January 1990 and in that notice the new hearing date namely 8 January 1990 was clearly stated therein. No explanation has been given as to why the solicitors for the defendant had failed to take heed of the said notice. It clearly shows that the solicitors for the defendant had committed a serious mistake by ignoring the notice. This mistake on the part of the solicitors can be taken into consideration by this Court for a stated by Lord Guest in *Ratnam v. Cumarasamy* [1965] 3 All ER 933:

> The rule of Court must, *prima facie*, be obeyed and, in order to justify a Court in extending time during which some step in the procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

Substitute the words "extension of time" in the aforesaid observation of Lord Guest with the words "to set aside the default judgment", the said observation aptly applies to this case.

The second and more serious mistake committed by the solicitors for the defendant is that in the affidavit in support (encl. 16) of the defendant's application to set aside the plaintiff's judgment there is no averment concerning the facts which would show a defence on merits. Such omission is incompatible with the principle set down in *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Rakyat* [1979] 1 MLJ 23 where the Federal Court said at p. 24:

> It is axiomatic that if the judgment is regular, then it is **an inflexible rule** that there must be an affidavit of merits that is an affidavit stating facts showing a defence on the merits. (Emphasis is mine).

In the present case the affidavit in support (encl. 16) merely states at para. 4 that:

> The chargor/defendant has raised triable issues in the affidavit of Low Chee Been dated 25 October 1989 filed herein.

Bearing in mind that the claims and allegations set out in the affidavit of Low Chee Been dated 25 October 1989 (encl. 7) had been denied and traversed with reasons given in the affidavit of the plaintiff's attorney affirmed on 3 January 1990 (encl. 13) it is more pertinent for the defendant to file in an affidavit of merits particularly when the defendant did not deem it fit to put in an affidavit in reply to some of the assertions stated in encl. 13.

I am of the view that based on the aforesaid grounds, the defendant's application to set aside the judgment in default granted to the plaintiff on 8 January 1990 should be dismissed.

Even if I am wrong in rejecting the defendant's application on the aforesaid grounds, there is no doubt that there was no triable issue raised by the defendant in the affidavit of their manager in encl. 7. The contentions raised in that affidavit are firstly that in the letter of offer dated 16 August 1984 (hereinafter referred to as 'the letter of offer') the plaintiff was informed of the approval for a fixed loan of 1.5 million ringgit and one of the terms was that the interest rate payable was 15.5% per annum - there was no term in the letter of offer to allow the plaintiff to vary the interest and/or to capitalise on penalty interest. Secondly upon execution of a charge and annexure to charge (hereinafter referred to as the annexure) the plaintiff introduced a new term to enable the plaintiff to vary the interest rate and to impose a further interest rate on all sums which were unpaid after the due dates of payment of lump sum. It is to be noted that the defendant contended that they executed the annexure (which was prepared by the plaintiff's solicitors) without having the benefits of independent legal advice. To my mind such assertion is highly incredible considering that the defendant is a private company with a board of directors and company secretary and the transaction they entered into was for a fixed loan of RM1.5 million which is by no means a small loan. Under these circumstances I again repeat that it is highly incredible that they had not sought legal advice before executing the annexure. Even assuming that they did so without seeking legal advice (to which I cannot accede) the fact that the annexure was signed by one of their directors who was authorised by a resolution passed by the board of directors of the defendant company to *inter alia* execute the annexure to create a first legal charge over the lands (see the resolution annexed to encl. 13) and the annexure was stamped with the defendant company's seal and witnessed by their secretary, they cannot now turn around and say that the annexure is not binding on them. They then chose to vaguely say that the letter of offer approving the loan mentioned earlier must override the subsequent annexure. This I cannot accept and I hold that the terms of the annexure are binding on them. That being the case the contentions of the defendant about the plaintiff having no right to vary the interest rate, and impose capitalisation of penalty interest are of no avail in view of the following clauses appearing in the annexure:

(a) Clause 1(a) which provides that the interest rate to be charged is 15.5% per annum **or such rate as may from time to time be substituted thereof** at monthly rests calculated as hereinafter provided. (Emphasis supplied)

(b) Clause 1(a) also provides for penalty interest at the rate of 3% per annum above the ruling rate for the time calculated on monthly rests **or at such rate as the chargee shall from time to time specify** on such unpaid sums from the date of default up to the date of actual payment. (Emphasis supplied).

(c) Clause 3 provides

> The chargee may from time to time by notice in writing of its intention so to do increase or reduce the ruling rate of interest payable thereunder and in regard thereto the following provisions shall apply and have effect:

(a) the decision of the chargee as to what at any time is the appropriate ruling rate of interest shall be final and conclusive and shall not be questioned on any account whatsoever;

(b) any increase or decrease in the ruling rate shall take effect and be payable as from the date specified in the said notice and shall be calculated as hereinbefore provide...

The defendant also contended that the plaintiff had failed to give notice of any increase of the ruling interest rate. This contention has been demolished by the plaintiff who through their attorney had produced and annexed as exhibits in the attorney's affidavit encl. 13 all the notices in writing informing the defendant from time to time of the increase and decrease in the ruling interest rate.

Thirdly the defendant posed a more serious contention in that by letter dated 1 October 1987 the plaintiff informed the defendant that the plaintiff had agreed to extend the period of the fixed loan of RM1.5 million granted to the defendant from 25 October 1990 to 25 October 1991 subject to the terms and conditions calculated thereon. One of the terms of the said letter was that the defendant was required to pay interest at the rate of 3% per annum above the Base Lending Rate ('BLR') on monthly rests on the outstanding loan. The said letter did not contain any terms or provision entitling the plaintiff to vary the interest in any manner whatsoever. Further the said letter did not confirm any terms and provision entitling or enabling the plaintiff to capitalised penalty interest. I have no hesitation in stating that there is no basis to this contention. Although it is true that the plaintiff had agreed to the loan period being extended from 25 October 1990 to 25 October 1991 by that letter, it also stated quite clearly that "All other terms and conditions shall remain unchanged", meaning that all the other terms and conditions in the annexure would continue to apply. Furthermore by that letter the schedule of repayments of the loan is as follows:

Due Date	*Amount*
25 October 1988	RM250,000
25 October 1989	RM250,000
25 October 1990	RM250,000
25 October 1991	RM250,000
Total	RM1,000,000

There is no denying that the defendant had failed to make the repayments according to the schedule for the years 1988 to 1990.

Fourthly the defendant contended that there had been a restructuring of the loan which upon a scrutiny of the evidence is not exactly true. What actually happened was that at the request of the defendant, the plaintiff agreed to grant an indulgence by deferring the legal proceeding against the defendant to enable them to repay the loan from the monthly rentals collected by the defendant from their factory which apparently the defendant had leased out to a third party. The monthly rental was in the region of RM14,000. The defendant duly made repayments from the rentals collected by them for the months of April 1989 to October 1989 and thereafter made no further payments (see the bundle of letters Exhibit LCB4 annexed to encl. 7). Hence the plaintiff had the right to proceed with this action particulars as stated by their attorney in his affidavit in encl. 13 that the indulgence was granted on a without prejudice basis and this has not been denied by the defendant. Furthermore under clause 5 of annexure it is provided:

> The chargee may at its discretion from time to time at the request of the chargor agree to suspend payments of or give such further time for payment or grant such indulgences as may be agreed but nothing contained in this clause shall be construed as prejudicing the chargee in the exercise of all or any of the remedies available to it on default of the chargor.

Furthermore clause 13 provides another safeguard to the plaintiff in respect of any indulgence granted by them to the defendant and that clause reads:

> Notwithstanding the fact that the chargee may not have exercised any remedy available to the chargee immediately on default by the chargor or that the chargee may have accepted some moneys from the chargor after such default the chargee shall not be held to have condoned or acquiesced in such default and may at any time thereafter exercise all or any of the remedies available to the chargee under this charge and any delay on the part of the chargee in taking steps to enforce the remedies conferred on or available to the chargee by this charge or statute shall not be held to prejudice the chargee's right of action in respect thereof.

Finally the defendant made a vague allegation that from time to time the defendant made payments to the plaintiff (particulars of which were within the plaintiff's knowledge). The plaintiff unlawfully and in breach of contract misappropriated some of these payments to account for penalised penalty interest which was not due nor payable by the defendant. Particulars of such misappropriation were solely within the knowledge of the plaintiff. The plaintiff was accordingly guilty of misappropriation of the defendant's money. They therefore alleged that they were entitled to a set-off or a counterclaim in respect of the moneys misappropriated by the plaintiff. Such an allegation is in the nature of alleging fraud on the part of the plaintiff and particulars of such fraud must be given - see *Wallingford v. Mutual Society* [1880] 5 AC 685. The defendant had failed to give particulars of even a single item of misappropriation of their money by the plaintiff. On the other hand the plaintiff in their attorney's affidavit encl. 13 had exhibited a complete set of the statement of account showing all the payments made by the defendant and all the transactions carried out in respect of the account of the defendant. Yet the defendant had not filed an affidavit in reply to pinpoint any misappropriation of their money from the set of accounts.

For the reasons stated above the defendant clearly has no defence as to the merits.

The application of the defendant to set aside the summary judgment in default obtained by the plaintiff is dismissed with costs.

Also found at [1991] 3 CLJ 1825